Prisoners' Votes (Again) and the 'Constitutional Illegitimacy' of the ECHR

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The relationship between the UK and the European Court of Human Rights is once again in the news. On the 22th May last, the Grand Chamber of the Strasbourg Court delivered its judgment in *Scoppola v. Italy* (No. 3), Application No. 126/05. This decision marks a potentially decisive moment in the long-running saga of prisoner voting rights. In essence, the Grand Chamber reaffirmed its ruling in *Hirst v UK (No. 2)* that a blanket and indiscriminate prohibition on prisoners voting was not in conformity with Article 3 of the First Protocol (the right to free elections). However, it also recognised that states enjoyed a wide margin of discretion when it came to regulating the circumstances in which prisoners should be entitled to vote. In particular, 'Contracting States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied', as long as they refrain from imposing 'any general, automatic and indiscriminate restriction' (see para. 102 of the judgment).

In other words, the *Hirst d*ecision has been upheld, but the UK has been given room to manoeuvre in how it responds to this requirement. However, the UK government must bring forward legislative proposals to amend the existing blanket ban within six months. If it does not, then in accordance with the Court's 'pilot' judgment in *Greens and M.T. v UK*, the 2500 pending cases before the Court on this issue will be 'unfrozen', which in turn may expose the UK to multiple claims for damages.

The judgment in *Scoppola* has been excellently analysed in depth by a number of commentators: see in particular Adam Wagner's posting on the UK Human Rights Law blog, Carl Gardner's analysis at Head of Legal and Marko Milanovic's comment on the judgment on the EJIL: *Talk* blog. As Joshua Rozenberg has argued, the Court has effectively extended an olive branch to the UK government, which it might be wise to accept. However, the judgment has also attracted the usual media outrage, as examined by ObiterJ on Law and Lawyers, with the Daily Mail describing the decision as representing 'Contempt for Democracy'. The Prime Minister has stated at Question Time in the House of Commons that the will of Parliament should prevail over the views of the Strasbourg Court on this issue (H. C. Debs. 23 May 2012, col. 1127), while Jack Straw and David Davis have in a letter to the Daily Telegraph called on Parliament to defy Strasbourg.

It appears therefore as if no easy resolution to the stand-off on prisoner voting rights between the Court and the UK is yet in sight. It has been just over one month since the Brighton Declaration, where as Mark Elliott has discussed on this blog the UK joined the other state parties to the ECHR in affirming the crucial role played by the Strasbourg Court in protecting human rights and rule of law across Europe and committed itself to respecting judgments of the Court. (See in particular paragraph 3 of the Declaration, which states in unambiguous language that [w]here the Court finds a violation, the State Parties must abide by the final judgment of the Court'.) The UK government thus appears to have got itself into a tangled mess. Its words and deeds in respect of the ECHR appear to be getting dangerously out of synch. Even if legislation amending the blanket ban on prisoner voting is laid before Parliament within the six month time-limit imposed by the Court, the Prime Minister's comments will certainly have fortified parliamentary opposition to making any concessions on this issue. As things stand, the UK is still locked on a collision course with Strasbourg, unless a dramatic political change of direction takes place.

Much of the hostility directed towards the Strasbourg Court is based on a visceral distaste of giving prisoners voting rights. Famously, even contemplating this idea appears to make the Prime Minister nauseous. Given the quasi-sacred status accorded to the idea of universal franchise within the UK constitutional order (the doctrine of parliamentary sovereignty is now justified on the basis that the House of Commons is elected by popular vote), it is perhaps odd that Strasbourg's mild request for amendment of the blanket disenfranchisement imposed on prisoners has attracted such a backlash. However, the rights and wrongs of this issue have been discussed before on this blog by Jeff King.

What has not been discussed in detail here or elsewhere is the argument made by Jack Straw MP, David Davis MP, Michael Pinto-Duschinsky, Dominic Raab MP and others that the Strasbourg Court is acting in a constitutionally illegitimate manner in insisting on a repeal of the blanket ban on prisoners voting, and that it would be a violation of democratic principles for the UK to defer to the decision of an unelected international court on such a manner. This argument drives much of the opposition to the Court's rulings in this context. It also explains why David Davis and Jack Straw in their above-mentioned letter to the Telegraph have described these judgments as infringing 'our constitutional rights'. It even underscores the call by Pinto-Duschinsky, Raab and others for the UK to consider withdrawing from the jurisdiction of the Court and/or from the Convention, which they argue would be a necessary and justified step if the Court fails to mend its ways and exercise greater self-restraint.

This argument that it is 'constitutionally illegitimate' for Strasbourg to rule against the UK on the blanket ban on prisoners voting is based on two distinct but inter-related elements. First of all, it assumes that the European Court of Human Rights has gone beyond the legitimate scope of its authority by treating the Convention as a 'living instrument' and adopting a teleological interpretative approach to its provisions. In its eyes of its critics, the original drafters of the Convention never intended it to be read in this way: as a result, the Court is abusing its authority when in a decision such as *Hirst* it interprets the right to free elections in Article 3 of the First Protocol as extending to cover the right to vote. Secondly, the assumption is also made that it is contrary for democratic principles for the UK to bind itself to follow the determinations of an unelected body such as the Strasbourg Court. However, both these assumptions are open to challenge.

To begin with, the argument that the Court is going beyond its mandate is open to question. As Danny Nicol has argued, the *travaux préparatoires* of the ECHR make it clear that there was no consensus among the original negotiators that it should be read in a narrow and minimalist manner ('Original Intent and the European Convention on Human Rights' (2005) *Public Law* 152-17). Furthermore, international treaty instruments such as the Convention are usually expected to be interpreted in a purposive manner, not by reference to the original intent of their drafters. In their letter to the Telegraph, Davis and Straw state that the job of the Court 'is to apply the principles of the Convention as originally intended by those who signed it – nothing more, nothing less', and go on to say that the Vienna Convention on the Law of Treaties requires that 'international treaties must be interpreted as their drafters intended'. However, this appears to be a straightforwardly incorrect interpretation of international law. The provisions of the Vienna Convention are notoriously vague: however, Articles 31 and 32 make it clear that courts should focus on the 'object and purpose' of treaties, and that the intention of the drafters can only ever be taken into account in a 'supplementary' manner. The 'living instrument' approach adopted by Strasbourg is very similar to that adopted by other human rights bodies, as well as by constitutional and supreme courts in Europe and across the Commonwealth. Of course, views will differ on whether the Court got it wrong when it decided *Hirst*, *Greens* and *Scoppola*. However, it is by no means obvious that its overall interpretative approach is 'illegitimate'.

Secondly, the argument that it is undemocratic for the UK to defer to decisions of the Strasbourg Court can also be challenged. The UK consented to the jurisdiction of the Court and voluntarily undertook to abide by its decisions. This would appear to be completely compatible in principle with the principle of democratic self-governance and national sovereignty: as Jeremy Waldron has commented, '[p]art of the point of being a sovereign is that you take on obligations'. Furthermore, as previously noted, Parliament is under no constitutional obligation to give effect to a Strasbourg judgment: it can choose to disregard any judgment of the Court, or even to withdraw from the Convention, at any time. If it does so, the UK may experience strong diplomatic pressure to change its mind from

other states. Its international credibility may also be fatally undermined by a refusal to respect a judgment of the Court, as this would call into question its commitment to the principles of human rights and rule of law which it consistently demands that other states respect. However, Parliament, not Strasbourg, retains the final say.

This means that the current relationship between the UK and the Strasbourg Court would seem to be entirely compatible with democratic principles. The fact that the UK faces considerable pressure to comply with *Hirst*, *Greens* and *Scoppola* does not mean that the Court's role under the Convention is illegitimate or anti-democratic: it simply reflects the fact that the expectation that Parliament should respect international law, human rights and the rule of law may at times require it to exercise its powers differently from how it would if left to its own devices. If anything, the Strasbourg Court could be seen as playing a positive role in enhancing British democracy: as Richard Bellamy (no lover of judicial supremacy) has argued, it helps to protect the rights of those who do not enjoy effective access to Parliament and the political process. It also helps to link democracy in the UK to democratic progress elsewhere, and makes possible a convergence of standards which elevates rights protection, democracy and the rule of law across the Council of Europe zone as a whole.

None of these objections constitute a full and complete answer to the Court's critics. Neither do they establish a complete case as to why Parliament should defer to the Court's views on prisoner voting. Opinions will inevitably differ as to when Strasbourg has crossed the line between law and politics, or when it has made a questionable decision. However, the claim that the Court's position on prisoner voting rights is 'constitutionally illegitimate' seems to be seriously open to debate.

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